BEFORE THE SAFETY AND HEALTH REVIEW COMMISSION
OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

COLE CONSTRUCTION COMPANY
OF SANFORD, INC.,

RESPONDENT.

DOCKET NO. 2006-4576
OSHA INSPECTION NO. 308784131
CSHO ID NO. K4809

ORDER

THIS CAUSE came on for hearing and was heard before the undersigned Reagan H. Weaver, Administrative Law Judge for the Safety and Health Review Commission of North Carolina, on December 6, 2006, at the Safety and Health Review Commission, 217 West Jones Street in Raleigh, North Carolina.

Daniel D. Addison, Assistant Attorney General, represented the Complainant. Michael C. Lord of Maupin Taylor, P.A, represented the Respondent. Complainant's witness was Lynwood Bruce Pearson, Safety Compliance Officer, North Carolina Department of Labor, Occupational Safety and Health Division. Respondent's witnesses were as follows: Wesley Parrish; and Steve McNeil and Gary Cole, both with Cole Construction Company of Sanford, Inc.

Pursuant to Rule 45 of the North Carolina Rules of Civil Procedure and Rule .0406(b) of the Rules of Procedure, Respondent moved to quash the subpoena duces tecum issued by the Complainant ordering Respondent's president, Gary Cole, to appear and produce records related to the rental of a man lift. In addition, Respondent sought an order precluding the Complainant from otherwise using the statements made by Mr. Cole during settlement negotiations. After the parties presented arguments, Respondent's motion was ALLOWED as to statements made in the conversation between counsel with their clients and witnesses present. As for the subpoena, the undersigned DENIED the motion's request to exclude records of the man-lift which had been mentioned in a prior submission of the Respondent. Respondent's mention of the man-lift and how it was to be used makes relevant, in the event the Commissioner wished to address such evidence, whether the man-lift was on the site at the time of the accident.

During the hearing, the undersigned sustained the objection of Respondent as to whether the witness, Steve McNeil, could testify about his experience doing steel erection with Mr. Turbeville. Respondent objected on the basis that Commissioner's counsel knew to ask the question only because it had learned the answer to the question in what it characterized as a settlement conference. Respondent argued at the hearing and presented a case, Commissioner of Labor v. Ultra Systems, Western Constructors, Inc., 5 NCOSHD 278 Adv. Sh. No.1 (RB 1993) to support its contention. The Commissioner argued in its post hearing brief that the offer of proof that it made should be admitted into evidence and the ruling on the objection reversed. Upon reconsideration of the testimony and the arguments presented, the ruling is REVERSED and the offer of proof is admitted. It is noted that both counsel agreed that Commissioner's counsel asked, in what is believed to have been a settlement conference, whether Mr. McNeil had ever done any steel erection work with Mr. Turbeville. It is evident that Commissioner's counsel was already interested in the topic or he would not have addressed the question in the first place in the settlement conference. The fact that he received an answer in that meeting should not prohibit his being able to ask the question again outside the settlement discussion as part of "otherwise discoverable" evidence as provided in Rule 408 of the North Carolina Rules of Evidence. N.C. Gen. Stat. 8C, Rule 408

ISSUES PRESENTED

Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1926.451(b)(5) by allowing an end of a platform ten feet or less in length to extend over its support more than 12 inches without guardrails such that the cantilevered portion of the platform was not able to support employees and/or materials without tipping?

SAFETY STANDARDS AND STATUTES AT ISSUE

1. North Carolina General Statute § 95-127(18) provides as follows:

A "serious violation" shall be deemed to exist in a place of employment . . . unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

2. 29 CFR 1926.451(b)(5) provides as follows:

Each end of a platform 10 feet or less in length shall not extend over its support more than 12 inches (30 cm) unless the platform is designed and installed so that the cantilevered portion of the platform is able to support employees and/or materials without tipping, or has guardrails which block employee access to the cantilevered end.

Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion, and enters an Order accordingly.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest dated February 13, 2006 and received by the Complainant, Commissioner of Labor of the State of North Carolina, contesting a citation issued January 4, 2006, to Respondent, Cole Construction Company of Sanford, Inc. ("Respondent" or "Cole Construction").

2. Complainant is charged with enforcement of the provisions of the Act.

3. Respondent is a corporation duly organized and existing under the laws of North Carolina. Respondent has been engaged in the construction business since 1974. Tr. 169-70. At all relevant times, Cole Construction employed less than eight employees. Tr. 170.

4. Respondent is subject to the provisions of the Act and is an employer within the meaning of North Carolina General Statute § 95-127(10).

5. Respondent acted as the general contractor for a project located at 2605 Jefferson Davis Highway in Sanford, North Carolina [hereinafter, the "Project"]. The Project involved the construction of an addition to the Grace Chapel Church. Tr. 31.

6. Mr. Cole, owner of Cole Construction, made Paul Turbeville Respondent's Superintendent for the Project based on his experience. Tr. 171. Mr. Turbeville, who was 68 years old, started work with Respondent in November, 2002. Tr. 170, 65-66. He had worked in construction for 30 to 40 years before joining Cole Construction. Tr. 171. Mr. Cole's father and Mr. Turbeville had worked together for another local construction contractor, and Mr. Cole had confidence in Mr. Turbeville's abilities to run the Project job site. Tr. 170-171.

7. Either June 27th or 28th, 2005, was the last day Mr. Cole was on the Project job site prior to the events that gave rise to this action. He had left the state for personal reasons. Tr. 68, 175. Mr. Turbeville was in charge of the site during Mr. Cole's absence. Tr. 175. Mr. Cole expected that Mr. Turbeville would finish the masonry wall and slots in it for bearing plates and beams. Tr. 176-77. While that work would entail limited welding, Mr. Cole did not expect angle clips to be welded to I-beams. Tr. 177-78, 181.

8. Mr. Cole did not expect that his crew would need a man lift, Tr. 180. A couple of months earlier, Cole Construction rented a man lift to allow its crew to safely set the structural steel, including the I-beams. Tr. 178. During a May 16, 2005 Safety Meeting about the Project, Mr. Cole directed that the steel erection work was to be performed using a man lift and safety harnesses, and Mr. Turbeville attended the meeting. Tr. 179; Resp. Ex. 2. About mid-week of the week beginning Sunday, June 26, 2005, Mr. Cole asked the rental company to move the lift from the Project to another job site. Tr. 179; Resp. Ex. 3.

9. On July 5, 2005, Mr. Turbeville took action so that angle clips would be welded on the I-beams as the initial step toward installing a floor. Tr. 41-43. Mr. Cole did not foresee that work being done at that time. Tr. 68-69, 75, 182, 211 (angle could have been mounted directly to wall). The work was out of the construction sequence expected by Mr. Cole. Tr. 181. Normally, the contractor would wait until the masonry walls were put up before pouring the floor. Tr. 181-182. The metal floor would not support the scaffolding needed to put up the wall, and falling debris from constructing the wall (mortar droppings and scrap block) would damage the floor. Tr. 182.

10. Without Mr. Cole's knowledge or direction, on July 5th and just before taking their lunch break, Mr. Turbeville instructed Respondent's employee, Steve McNeill, to place two separate 9-foot long, 2 by 8 wooden planks across two I-beams, perpendicular to the I-beams and resting on top of them with one end of the planks butted up against the concrete block wall. Tr. 51, 54, 130-131; Compl. Ex. 5. The other ends of the planks hung over the sides of the I-beams by approximately 3' 4". Compl. Ex. 5. The I-beams were approximately 4' 10" apart and 14' 3" above the ground. Tr. 49, 50. The planks were previously used at the site for form work; Cole Construction does not use planks as walk boards. Tr. 130-31, 151, 197. Mr. Turbeville expected that the planks would be used by Wesley Parrish, an independent contractor/welder. Tr. 157, 34.

11. At the time of the accident, Messrs. McNeill, Turbeville and Parrish, were engaged in "steel erection activity" within the meaning of 29 CFR 1926.751(b)(1). Tr. 86. No one was using fall protection. Tr. 167.

12. After returning from lunch at approximately 12:45 pm, Mr. Parrish began performing the task he was asked to do--welding the angle clips to the I-beams. Tr. 156-158. He did not need the planks or any assistance. Tr. 156-57, 159 ("I didn't need no help"). Nonetheless, Mr. Turbeville joined Mr. Parrish and stood on the planks. Tr. 156-157. Mr. Turbeville handed and tossed angle clips to Mr. Parrish as he performed the welding work. Tr. 157, 160. There was no reason for Mr. Turbeville to be on the planks or to assist Mr. Parrish. Tr. 157-58, 159, 230-31.

13. A suitable ladder was available for Mr. Turbevill's use. Tr. 86-87, 132, 163. Scaffolding was available for his use. Tr. 87-88, 132, 163. Aluminum walk boards off-site, if not on-site, were available for his use. Tr. 184. There is no evidence why Mr. Turbeville did not avail himself of this safety equipment when he chose to assist Mr. Parrish. Tr. 88.

14. After welding four angle clips, Mr. Parrish sat on the I-beam and waited while Mr. McNeill cut another piece of angle. Tr. 161. Mr. Turbeville waited also; he remained standing on a plank and was both facing and looking toward the block wall. Tr. 162. He then just turned completely around, took a step and fell to the ground below when the plank cantilevered up. Tr. 162. Mr. Turbeville was not turning to get the angle from Mr. McNeill. Tr. 163. There is no evidence why Mr. Turbeville turned and walked down the plank. Tr. 163. The 9-1-1 call was placed at 1:01 pm. Tr. 72-73. Mr. Turbeville eventually died as a result of the fall. Tr. 58.

15. Mr. McNeill knew and knows of nothing that Cole Construction should have done to prevent the accident. Tr. 133.

16. Mr. Parrish knew and knows of nothing that Cole Construction should have done to prevent the accident. Tr. 163.

17. Mr. Cole knew and knows of nothing that Cole Construction should have done to prevent the accident. Tr. 188. There is no evidence that Mr. Cole could reasonably foresee that Mr. Turbeville would walk on an unsecured plank. Tr. 75. Cole Construction did not authorize the conduct of Mr. Turbeville and it was in fact in violation of the specific training he had received on scaffolding. Tr. 172-173; Resp. Ex. 1.

18. On or about July 7, 2005, Safety Compliance Officer Bruce Pearson, employed by the North Carolina Department of Labor, conducted an inspection of Respondent's work site. Tr. 26, 30. During the course of the inspection, Officer Pearson took photographs, made notes, interviewed employees and obtained documents. Tr. 33-35.

19. Cole Construction had a written safety program in place at the time of the accident; it had trained its employees about the safety program; it had a specific work rule on fall hazards; it had installed adequate guardrails at the Project to prevent falls; it had a work rule requiring that scaffolding comply with OSHA specifications; it had trained employees on how to properly construct a scaffold; it held Safety Meetings; it enforced its safety rules (including one disciplinary warning approximately two years earlier for Mr. Turbeville for not using fall protection when clearing snow off of a roof); it made regular and frequent inspections of its job sites by competent persons; and it corrected hazards discovered during the inspections. Tr. 75-77, 79-80, 129-30, 117.

20. Cole Construction specifically trained its employees, including Mr. Turbeville, on the 12-inch cantilever rule contained in 29 CFR 1926.451(b)(5). Tr. 172-173; Resp. Ex. 1. Other than Mr. Turbevill's actions on July 5, 2005, there is no evidence that Paul Turbeville had ever before walked on elevated and unsecured planks while employed by Respondent, nor is there any evidence that he ever allowed other employees to do so. Tr. 81.

21. Mr. Turbeville exercised poor judgment in ordering the placement of the planks in question and in walking on the unsecured planks. Tr. 81-82.

22. Tim Murr, the Executive Pastor for Grace Chapel Church, spoke to Mr. Turbeville at the hospital following the accident. Mr. Murr asked Mr. Turbeville what had happened, and Mr. Turbeville replied to the effect that, "I just walked off the ledge. I knew better." Tr. 82-83.

23. Complainant issued Respondent one serious citation with one item under the scaffold standard (29 CFR 1926.451(b)(5)), with a proposed penalty of $2,100.00. Tr. 36-37. Officer Pearson recommended the issuance of the citation because he believed that Respondent knew or could have, with the exercise of reasonable diligence known about the violation. Tr. 66-68. Mr. Turbevill's knowledge of his own actions was the sole basis for Officer Pearson's belief. Tr. 62, 66-69.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. This Court has jurisdiction of this cause and the parties are properly before the Court.

3. Because the fall hazard was not more than 15 feet, Respondent's workers were not required to be protected from fall hazards by guardrails systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems. 29 CFR 1926.760(a)(1) (fall protection mandated only when distance exceeds 15 feet). Tr. 86.

4. Complainant failed to meet its burden of proving a violation of the cited standard.

DISCUSSION

This decision turns on the question whether the Commissioner is entitled to rely on a particular instance of a supervisor's knowledge to establish the knowledge component required to prove a serious violation. Where hazardous conduct of a supervisor endangers only the supervisor and the conduct is unplanned, transient, idiosyncratic and unpredictable, should the Commissioner be able to impute the supervisor's knowledge of the hazard to the employer in order to establish that a serious violation of the OSHA law occurred? After analyzing the evidence and the law, this order concludes that the Commissioner did not carry her burden of proof, but the reason is based on the lack of foreseeability rather than the fact that the exposure to harm was limited to the supervisor himself.

The definition of a serious violation as found in N.C.G.S. 95-127 (18) (2005) states:

A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

The parties have correctly identified the five "elements" of a serious violation. They agree as to the Commissioner having proved the existence of the first four elements. They disagree whether the facts established at the hearing are sufficient to prove the fifth element of knowledge. The burden of proof remains with the Commissioner to prove by the greater weight of the evidence all five elements. [Rule .0514(a)] Before examining the law as it has been interpreted by prior cases, it is worthwhile to examine the wording of the statute itself.

The legislature has referred to "a condition which exists" or "practices, means, methods, operations, or processes which have been adopted or are in use. . . ." (emphasis added) These words suggest some passage of time, however slight--not necessarily of any significant length, but the reference appears to be to a condition that has been allowed to exist to the harmful exposure of employees. This is indicated by the "exists", the "in use" and the "adopted" terminology. In other words, the language suggests an existence of a condition, practices, means, methods, operations, or processes that are the product of purposeful or inattentive conduct. Purposeful conduct is suggested by the terminology, "adopted" Inattentive conduct is suggested by the implication that some time, of unspecified duration, has passed with the situation existing without correction. With these observations in mind, we can look at the meaning of the requirements of the fifth element for a serious violation: Did the employer not know of the condition or the practices, means, methods, operations, or processes or, if the employer did not have actual knowledge, did the employer not exercise reasonable diligence to know of the condition, practices, means, methods, operations, or processes?

Numerous cases have established and confirmed and reconfirmed the appropriateness of imputing a supervisor's knowledge of conduct to his employer. See e.g. Brooks v. McWhirter Grading Co., Inc. OSHANC 77-196 (RB 1978), aff. in relevant part, 49 N.C.App.352 (1980), rev. other grounds, 303 N.C. 573 (1981); Brooks v. Arsco & Associates, Inc., 114 N.C.App. 711 (1994); Commissioner v. DWH Painting Company, Inc. OSHANC 2004 -4356 (2005). Remarkably, the question whether it is proper to impute the knowledge of a supervisor's own misconduct to the employer, when the only person exposed to harm is the supervisor himself, appears not to have been tested before in North Carolina, "in the ordinary context, the supervisor is not himself the malfeasant who personally acts contrary to instructions . . . and thus the supervisor's knowledge of an employee's unsafe conduct is imputable to his "master, the employer" W.G. Yates & Sons v. Occupational Safety & Health Review Commission, 459 F.3d. 604, 609 (5th Cir., 2006)(ftnt. 7) The court in Yates concludes appropriately after making this observation that a. . . when the Government establishes employer knowledge of unsafe conduct in these ordinary cases, the burden will properly shift to the employer to establish its affirmative defense of unforeseen employee misconduct, if appropriate" The Yates court continues by saying,

. . . in this case we address only the situation in which it is the supervisor himself who engages in unsafe conduct and who does so contrary to policies of the employer. Thus, a supervisor's knowledge of his own rogue conduct cannot be imputed to the employer; and consequently the element of employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could under the circumstances of the case, foresee the unsafe conduct of the supervisor

Id, at ftnt.8

While the law of the 5th Circuit is not controlling on this state's OSHA Review Commission, the observations of the Yates court contribute to the analysis of this case.

The employer has no responsibility to prove an affirmative defense of isolated employee misconduct if the Commissioner has not proved all the elements of a serious violation. In this case, the facts developed at the hearing did not establish employer knowledge. In Brooks v. Acoustics, 2 NCOSHD 784, 787 (1986), the North Carolina OSHA Review Board approved the hearing examiner's decision that employer knowledge is a "necessary precondition" to proving violation of a safety standard. "It is the complainant's burden to prove employer knowledge, either actual, constructive, or imputed." Id. The Board upheld the examiner's vacation of a citation and penalty. In Acoustics, the examiner and the Board agreed that there was insufficient evidence to support that the regular supervisor had been given authority to delegate his supervisory authority to another employee. Consequently, the Board found that the complainant had not proved employer knowledge because the "supervisor" who knew of the unsafe condition had not been proven to have legitimate authority from the employer to be acting as a supervisor.

"The doctrine of imputed or constructive knowledge requires the application of the doctrine to the peculiar factual setting of causes in which the issue arises" Id. In Acoustics, the hazardous fan had been on the job site for just two days, and the regular supervisor had not been present while the unsafe condition was present. Thus, the examiner and the Board found that the evidence was "too remote to establish constructive knowledge" Id.

The evidence introduced at this hearing establishes that the boards that were placed across the I-beams and were used as a makeshift scaffold were not in position for long. SCO Pearson testified that he was told in his investigation that the boards were up for four hours; however, the testimony at the hearing proved that the boards were installed just before lunch. The crew ate lunch and then the welder began welding angle braces at about 12:45. The accident occurred at about 1:00 pm, as the 911 call was made at 1:01 pm. The testimony of the employee, Steve McNeil, who positioned the boards, strongly suggests that the makeshift scaffold was created just before lunch, and it was not used before lunch. When it was used, after lunch, the fall occurred within approximately fifteen minutes after the crew's return from lunch. Thus, the hazard that was created by the supervisor was in place very briefly and argues against knowledge being imputed to the employer. While every case deserves a separate analysis of its peculiar facts, the fact that the Board in Acoustics found two days to be an insufficient time period for the hazard to have become constructively known confirms that the length of time that a hazard is allowed to exist is relevant to a determination of whether imputation is appropriate. The time period for exposure in this case is clearly much less--not to ignore the danger from an unsupported makeshift scaffold being arguably greater than a fan that had an unguarded V-belt as in Acoustics.

The boards were put in place specifically at the request of Paul Turbeville, the only supervisor being used by Respondent at the time. Mr. Turbeville was the only person who used the boards. The employer's owner was out of town and had left things in the hands of Supervisor Turbeville. The owner, Gary Cole, testified that he was unaware that Mr. Turbeville was going to be doing anything to construct the floor of the second floor. His expectation was that the adjoining wall would have been constructed before the floor. Consequently, there is no basis to believe that Mr. Cole should have first, expected that the employees would be working to construct the floor, and second, that a completely superfluous and makeshift scaffold would be created to allow Mr. Turbeville to help the welder do his job. The evidence indicates that a ladder and regular scaffolding (as pictured in Complainant's Exhibit 1) was on site and could have been used by Mr. Turbeville to hand the pieces to the welder. There was no evidence to suggest that Mr. Turbeville was more effectively helping the welder by being on top of the girders. Mr. Turbeville was choosing a means of delivery of the angle pieces that could not have been reasonably foreseen by Mr. Cole. Mr. Parrish did not need Mr. Turbevill's assistance in this manner.

Mr. Cole hired Mr. Turbeville knowing that Mr. Turbeville had known Mr. Cole's father. Mr. Cole knew that Mr. Turbeville had worked in the construction industry for more than 30 years, and he had been with Cole Construction for a little over two and one-half years himself. Mr. Cole was entitled to rely on a baseline of knowledge even though this particular construction project confronted Mr. Cole with a different type of construction than what he had built in the past. See Brooks v. Floyd S. Pike Electrical Contractors, Inc., 2 NCOSHD 1170, 1176 ((1987). As part of the baseline of knowledge Mr. Cole would have known Mr. Turbeville to have had, had he known that Mr. Turbeville would want to assist Mr. Parrish from the top of the I-beams, would have been the fact that he, Gary Cole, had disciplined Mr. Turbeville for not using fall arrest devices when he was clearing snow off of a roof approximately two years earlier and that no other misconduct had occurred since that discipline was given. Also, just a little more than one year earlier, Mr. Cole had specifically instructed Mr. Turbeville in the twelve inch cantilever rule for scaffolds. In addition, the company had established a safety program that was in writing and was available on site.

N.C.G.S. 95-127 (18) refers to the employer not knowing or not being able to know with reasonable diligence. The evidence at hearing establishes that Mr. Cole did not have actual knowledge of the hazardous condition. The next question is whether Mr. Cole could have, with reasonable diligence, known that Mr. Turbeville would choose to assist the welder in the manner he chose. The evidence at the hearing does not establish that Respondent could reasonably have been expected to foresee that Mr. Turbeville would engage in the clearly hazardous conduct that resulted in his death. Mr. Cole's expectation was that completely different work would have been occupying the crew. And Mr. Turbeville was reported to say, apparently on his death bed, that he "knew better." As was stated in Ocean Electric Corp. v. Secretary of Labor, 594 F.2d 396 (4th Cir. 1979), ". . . even the best-laid plans cannot always eliminate violations of safety practices where 'the employee's act is an isolated incident of unforeseeable, idiosyncratic behavior'. . . ." Ocean Electric Corp, at 401 quoted in Pike, supra at 1176.

Not finding a violation by the employer on these facts does no harm to the principle that supervisors have important roles to play in providing safe environments for employees. As stated in McWhirter, supra, on its first hearing by the Review Board, a corporation can furnish its employees with safe conditions only by acting through its management and supervisory personnel. McWhirter at 2 NCOSHD 103. An important distinction in this case is who was exposed to the hazard of the unsafe scaffolding. Mr. Turbeville, himself, is the only employee who was exposed, and the exposure was brief. As noted, this Commission has been willing on numerous occasions to impute knowledge to an employer when the supervisor has allowed unsafe conditions to exist that endangered other workers or ordered subordinates to put themselves in harm's way. In Mr. Turbevill's case, he put himself in harm's way and no one else. While he was the supervisor, he endangered no one other than himself.

The Commissioner argues that the Respondent should have had more specific work rules relating to the use and installation of scaffolding. Further, she argues that Respondent's enforcement of rules was not as rigorous as it should have been and that Mr. Turbeville was given, essentially, too much discretion to supervise a project with which Respondent and Mr. Turbeville had little or no experience. While these factors relate to the issue of foreseeability indirectly, they do not, in this case, establish a strong enough nexus between their existence, assuming they were established (which this fact-finder does not find), and proving that the Respondent could have known, with reasonable diligence, that Mr. Turbeville would engage in hazardous conduct. The Commissioner's arguments are made in the context of proving employee misconduct, a defense for the Respondent that only applies and becomes pertinent after the Commissioner has proved all five elements.

In the final analysis, the burden of proving knowledge, however it is done, is the Commissioner's. Acoustics at 787. The burden of the employer to prove isolated employee misconduct does not arise until a serious violation has been established. The Commissioner did not prove that Respondent had actual knowledge of the violation. To assert that the fifth element of a serious violation, employer knowledge, was established purely by virtue of Mr. Turbevill's own knowledge would be the same as imposing strict liability on the Respondent. "Employers are not strictly liable for violations of OSHA standards that result from supervisory misconduct." Brooks v. Floyd S. Pike Electrical Contractors, Inc., OSHANC No. 86-1304, 1175-1176 (1987) quoting Ocean Electric Corp. v. Secretary of Labor, 594 F.2d 396 (4th Cir. 1979). The Ocean Electric court said, "if a violation by an employee is reasonably foreseeable, the company may be held responsible. But, if the employee's act is an isolated incident of unforeseeable or idiosyncratic behavior, then common sense and the purposes behind the Act require that a citation be set aside." Ocean Electric, supra at 401. In this case, there is no evidence that Respondent could have, with the exercise of reasonable diligence, known that Supervisor Turbeville would use planks laid across the I-beams as a non-conforming scaffold for himself from which he would toss angle clips to the welder to conduct welding work that Respondent's owner did not expect to be done. Proof of the fifth element of a serious violation has not been established.

Additionally, the fact that the supervisor's conduct exposed only himself to a hazard, while significant as a factor in analyzing culpability of an employer, should not be the grounds on which this decision rests. The basis of this decision is the lack of foreseeability of Turbeville's misconduct, not the lack of exposure to harm to others. If Respondents were allowed not to be responsible for supervisor's acts just because a supervisor was the only person exposed to harm, then the Commission would be ignoring the important role supervisors play as role models for their subordinates and other employees in the company. Supervisors do not need a free pass for hazardous conduct of any kind.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, it is hereby ORDERED that Citation No. 1, Item 1, be and the same is hereby DISMISSED.

This, the 6th day of September, 2007.

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Reagan H. Weaver
Administrative Law Judge